In the Supreme Court of the United States

OCTOBER TERM, 1957

THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,
Petitioner,
vs.
COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM, COUNTY OF LOS ANGELES TAX COLLECTOR, and JOHN R. QUINN, COUNTY OF LOS ANGELES ASSESSOR.
No. 382

VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.,
Petitioner,
vs.
COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR.
No. 385

On Petitions for Writs of Certiorari to the Supreme Court of the State of California

Motions of First Methodist Church of San Leandro and First Unitarian Church of Berkeley for Leave (1) to File Brief and (2) to Argue Orally as *Amici Curiae* in Support of Petitions

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First Methodist Church of San Leandro and First Unitarian Church of Berkeley, both in California, hereby respectfully move the Court for leave to file the attached brief

amici curiae in support of the above captioned petitions for writs of certiorari to the Supreme Court of the State of California. The consent of counsel for petitioners has been obtained. The consent of counsel for respondents was requested but refused.

Said movants also respectfully move the Court for special leave to argue orally *amici curiae* in support of the petitions.

Movants respectfully request consideration of the two motions independently of each other as well as jointly.

The reasons for both motions stem from facts and are grounded in considerations now to be stated.

The movants appealed to this Court from the decisions against them by the Supreme Court of the State of California as reported in 48 Cal. 2d 901.[1] The filing of movants' Jurisdictional Statement (No. 485, October Term, 1957) on September 19, 1957, was timely. But it now appears that any action by the Court thereon will not, in the absence of special provision, permit hearing contemporaneously with Nos. 382 and 385 and that the decisions therein are likely to control movants' appeal.

Movant First Methodist Church of San Leandro is particularly concerned because it now appears that its constitutional rights may be determined upon the basis of decision in the above entitled consolidated cases involving only Unitarian Churches.

Movant First Methodist Church of San Leandro believes that the impact of the challenged California constitutional and statutory provisions denying traditional tax exemptions is particularly violative of its rights under the Constitution of the United States because of the special impact of such provisions upon the Methodist religion. Methodist religious

1 The cases of movants are consolidated before this Court as they were before the Supreme Court of the State of California.

disciplines and articles of faith differ significantly from the Unitarian (or Universalist) and are believed more representative of general Protestant religious faith.

Said movant respectfully suggests that since the impact of the state action is curtailment of religious liberty, the wider the spectrum of religious doctrine presented for the Court's consideration, the better will the Court be enabled to appraise the challenged state action.

Official Methodist religious discipline is plainly undermined and affronted by the challenged California action. That discipline, as reiterated in direct connection with the state action, includes:

> "We protest legislation requiring the loyalty oath of any church to any state or nation. The church must be in the world but not of it. She belongs to no class, nation, or race. She belongs to Christ. The Church cannot serve two masters. She can obey but one, Jesus Christ. The Church must be free to bring all persons and institutions under the judgement of the gospel. In so far as the state is righteous, it has nothing to fear from the Church. In loyalty to her Lord the Church will be its grave and sturdy ally. But in so far as a state seeks to dominate, the Church must resist. Freedom is secure and justice is maintained only as the Church lives and works among free men, not as a creature subservant to the state, but as a free, unintimidated voice, speaking for Almighty God in opposition to error and evil, and in support of truth and righteousness."
>
> Paragraph #2025 of The Methodist Discipline, 1956.

> "We declare our support for those churches which are testing the constitutionality of the California law which requires a non-disloyalty declaration as a prerequisite for tax exemption. We hope that all of our churches will find ways of saying unequivocally that the church belongs to God and not to the state. We are loyal

to our state and nation, but if that loyalty ever conflicts with our loyalty to God, we must serve God first."

Statement Adopted by the California-Nevada Annual Conference: Page 136 of California-Nevada Annual Conference Journal, 1954.

"We must protect the freedom of the church to make moral judgements without coercion from any political institution."

Statement Adopted by the California-Nevada Annual Conference: Page 131 of California-Nevada Annual Conference Journal, 1955.

Movant First Unitarian Church of Berkeley here has the support of the American Unitarian Association, as it did below. Therefore it believes it may be positioned to present more comprehensive views. It appears not inappropriate to suggest that the national denominational body might be heard to advantage.

Said movant, recognizing the above referenced differences between Methodist religious doctrines and its own, respectfully joins in suggesting the merit of measuring the challenged California action against a broader spectrum of religious doctrine.

The issues here are not of a narrow, schismatic nature; they transcend sect in touching millions of Californians. Movants believe that the challenged California measures are laws respecting an establishment of religion and prohibiting the free exercise thereof in violation of the Constitution of the United States. They believe that this question of law is crucial and merits further consideration than has been given it by the parties.

Movants respectfully and deeply appreciate the burdens upon the time of this Court. They submit these motions only

after the most careful consideration and because they believe that the granting of both, as movants understand the governing rules and requirements, would entail no more than consideration of the single additional brief appended and an additional total of only thirty minutes of oral argument.

Respectfully submitted,

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March 14, 1958

BRIEF OF
FIRST METHODIST CHURCH OF SAN LEANDRO
and
FIRST UNITARIAN CHURCH OF BERKELEY
as Amici Curiae
IN SUPPORT OF PETITIONS

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Brief of First Methodist Church of San Leandro and First Unitarian Church of Berkeley as *Amici Curiae* in Support of Petitions

Interest of Amici Curiae

The interest of *amici curiae* is shown by the printed motions to which this brief is appended. In brief summary:

Amicus curiae First Methodist Church of San Leandro, whose appeal to this Court was seasonably taken and now pends, believes that the special impact of the challenged California action upon its rights of religion should be

weighed by the Court and that consideration of this brief *amici curiae* will suitably aid that end.

Amicus curiae First Unitarian Church of Berkeley, whose case before the court below was consolidated with that of First Methodist Church of San Leandro, is indentically circumstanced with respect to appeal to this Court. It believes that because it has the support and assistance of the American Unitarian Association, the national denominational body, the views it presents may perhaps be more representative of the entire body of Unitarian Churches and Fellowships in California, nothwithstanding the autonomy of individual churches fostered by the Association.

Neither *amicus curiae* enters any disclaimer in any wise against the positions taken or arguments made by petitioners in this proceeding. Rather, they wish to have the opportunity to supplement them by additional considerations deemed meritorious and pertinent—particularly considerations relating to religious freedom.

ARGUMENT

I. Both Article XX, Section 19, of the California Constitution and Section 32 of the State Revenue and Taxation Code Prohibit the Free Exercise of Religion, Particularly by Those Churches and Members Thereof Whose Religious Disciplines Place Loyalty to God Above All Other Loyalties or Require Freedom to Pass Moral Judgment Upon the Exercise of Temporal Power, or Both.[1]

A. The California Measures Involved.

The Constitution of the State of California contains two provisions directly relevant to the questions before the Court.

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1. The referenced state constitutional and statutory provisions are set forth in Appendix A of Petitioners' Consolidated Opening Brief. Following the lead of Petitioners (Consolidated Opening Brief, p. 9, fn. 2), we shall, for ease of reference, hereafter usually refer to the state constitutional provision as Article XX and the state statute as Section 32.

One for more than half a century has provided:

> "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship * * * shall be free from taxation." Article XIII, Section 1½[2]

The other, Article XX, was adopted by the state electorate in 1952.[3] It provides in relevant part:

> "* * * no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:
>
> "* * *. Receive any exemption from any tax imposed by this State * * *"

There is also a California statute directly relevant to the question. It, Section 32, provides:

> "Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State * * * shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of Cali-

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2. The full text of this state constitutional provision is set forth in Appendix A to Petitioners' Consolidated Opening Brief, including an amendment extending the exemption to buildings in the course of erection. Now and ever since November 6, 1900, Article XIII, Section 1½ has exempted church buildings and real property precisely as quoted above.

3. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Board of Education v. Barnette* (1943), 319 U.S. 624 at 638.

fornia by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such a declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." [Stats. 1953, ch. 1503, § 1 (now codified in Revenue and Taxation Code as Section 32)]

B. Article XX and Section 32, Each and Both, Prohibit the Free Exercise of Religion.

The very first words of our Bill of Rights, viz., the first words of the First Amendment to the Constitution of the United States, declare:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

That this First Amendment prohibition extends to the states of the United States through the Fourteenth is now settled. *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94, 100, 107; *McCollum v. Board of Education* (1948), 333 U. S. 203, 210-211; *Cantwell v. State of Connecticut* (1940), 310 U.S. 296, 303.

How does Article XX prohibit the free exercise of religion? How does Section 32?

The first requisite to a sound answer is recognition of the truth that "The power to tax involves the power to destroy." (*McCulloch v. Maryland* (1819), 4 Wheat (U.S.) 316, 431.) The second is that Article XX, no less than Sec-

tion 32, is a purported exercise of taxing power. The court below, the final arbiter in defining the meaning of state law, plainly construed it as such, particularly in its rejection of the claim that it violated guarantees of the federal Constitution.

> "We turn now to the question of the validity of the constitutional amendment * * * under guarantees of the federal Constitution. We approach this phase of the case in the light of the fact that * * * Article XX prescribes no penal sanctions and in a governmental sense may be deemed merely a declaration of state policy with reference to its own tax structure * * *" 48 Cal. 2d 419, 433.[4]

It is proposed now to spell out the violation by Article XX (that of Section 32 will be covered later) of the federal Constitution's guarantee against laws prohibiting free exercise of religion.

Measuring Article XIII, Section 1½ of the state Constitution against Article XX, it is clear that a church which does not advocate whatever may be condemned by the latter receives the tax exemption. It is also clear that a church which advocates whatever may be condemned by Article XX is denied the tax exemption.

The crux of the matter is now in sharp focus. Article XX, when applied to religions requiring freedom to advocate—regardless of any actual advocacy—squeezes them in a diabolical vise. *At any moment when the requisite religious freedom to advocate may be exercised by advocacy, the tax collector must step in to levy tribute. Such is the mandate*

4. That the court below interpreted both Article XX and Section 32 as tax measures is further clear from its extended discussion commencing at 48 Cal. 2d 426 on through to the quoted language at 433.

of Article XX.[5] *And if the amount of the levy can be satisfied only by confiscation of the church's edifice and all of its material substance—a very practical prohibition of the free exercise of religion—that, so far as Article XX is concerned, is just an incidental misfortune.*

The religious disciplines of First Unitarian Church of Berkeley and of First Methodist Church of San Leandro plainly call for the freedom of advocacy punished by Article XX.

The American Unitarian Association is the official national denominational body of Unitarianism. Living up to the principles of that faith, the Association exercises no hierarchical or other control over the beliefs of the 376 Unitarian Churches and 220 Unitarian Fellowships in the United States.[6] The principle of Unitarianism against imposition of rigid dogma upon individual Unitarian Churches and protecting the basic autonomy of each is well established. Organized on May 25, 1825, in Boston, Massachusetts, the Association was formally incorporated in 1847 by Chapter 42 of the Acts of the Commonwealth of Massachusetts. The nature and scope of the Association are described as follows:

> "The Association is a voluntary organization of churches and other religious, educational and philanthropic societies, and life members now empowered to vote, uniting themselves in the furtherance of the purposes enumerated in Article I of the Association's By-laws.

5. **Article XX does not forbid advocacy. It merely puts a price on it. Just pay the tax and, so far as Article XX is concerned, the advocacy it condemns is unrestrained. This incongruous, built-in effect of Article XX is further shared in common with Section 32.** **See post, p. 15.**

6. The figures are as of April 30, 1957. Unitarian Fellowships are small organized religious groups having no minister.

"In thus associating themselves the individual churches and societies abrogate no part of their independent autonomy; * * *"

Unitarian Year Book, 1957-1958, p. 12.

Article I of the Association's By-laws reads as follows:

"Article I. Purposes and Objectives

"Section 1. In accordance with its charter, the American Unitarian Association shall 'be devoted to moral, religious, educational and charitable purposes.'

"In accordance with these purposes the American Unitarian Association shall:

"(1) Diffuse the knowledge and promote the interests of religion which Jesus taught as love to God and love to man;

"(2) Strengthen the churches and fellowships which unite in the Association for more and better work for the Kingdom of God;

"(3) Organize new churches and fellowships for the extension of Unitarianism in our own countries and in other lands; and

"(4) Encourage sympathy and cooperation among religious liberals at home and abroad.

"Section 2. The Association recognizes that its constituency is congregational in polity and that individual freedom of belief is inherent in the Unitarian tradition. Nothing in these purposes shall be construed as an authoritative test."

Ibid., p. 13.

The religious principles to which members of the First Unitarian Church of Berkeley, incorporated under the laws of California in 1893, are committed are formulated by that Church individually. They are summarized by five articles of faith appearing upon applications for membership, as follows:

"Individual freedom of belief,

"Discipleship to advancing truth,

"The democratic process in human relations,

"Universal brotherhood, undivided by nation, race or creed,

"Allegiance to the cause of a united world community."

Application for Membership, First Unitarian Church of Berkeley

Since the religious beliefs which unite members of each individual Unitarian Church are the province of the particular church itself, and since the minister is the spiritual head of the church, there can be no more authoritative statement of the religious principles than that which comes from his lips. Accordingly, there is appended the pertinent enunciation of religious principles of First Unitarian Church of Berkeley by Dr. J. Raymond Cope, who has served as its minister for twelve years.

Dr. Cope's expressions of the abiding Unitarian religious doctrines while completely official for his church, are premised, of course, upon those which draw Unitarians together in their faith everywhere. The latter stem from the work of William Ellery Channing, founding father of Unitarianism in this country. In his "Discourse on Spiritual Freedom", his is the voice of Unitarianism and here are his pertinent expressions of Unitarian doctrine:

> "I call that mind free, which protects itself against the usurpations of society, which does not cower to human opinion, which feels itself accountable to a higher tribunal than man's, which respects a higher law than fashion * * * which conscious of its affinity with God, and confiding in his promises by Jesus Christ, devotes itself faithfully to the unfolding of all its powers * * *

"In [society] opinion and law impose salutary restraint, and produce general order and security. But the power of opinion grows into a despotism which more than all things represses original and free thought, subverts individuality of character * * * and chills the love of perfection. Religion * * * which balances the power of human opinion, which takes man out of the grasp of custom and fashion, and teaches him to refer himself to a higher tribunal, is an infinite aid to moral strength and elevation * * *

"The idea of a national interest prevails in the minds of statesmen, and to this is thought that the individual may be sacrificed * * * [But] a man is not created for political relations as his highest end, but for indefinite spiritual progress, and is placed in political relations as the means of his progress. The human soul is greater, more sacred than the state, and must never be sacrificed to it."

4 Works of William E. Channing 67

The religious discipline governing congregants of the First Methodist Church of San Leandro is no less clear in establishing ineradicable inconsistency between their demands and those of Article XX. The basic source of Methodist discipline is, of course, the Bible. Its injunctions requiring undivided allegiance to God, calling for freedom beyond interference by man, are too well known, pervading and repeated for any need to extend this brief with quotations from the source of all Methodist faith.

It is, then, biblical injunction which is the cornerstone of Methodist Discipline calling for undivided, unqualified allegiance to God, not to man or the institutions of man. Such biblical commands underlie the Methodist Discipline and doctrine quoted in the motions to which this brief is appended. Discipline and doctrine demanding that "The

church must be free to bring all persons and institutions under the judgment of the gospel"; that the church must be maintained "not as a creature subservient to the state, but as a free, unintimidated voice, speaking for Almighty God in opposition to error and evil"; and that the church must be protected in freedom "to make moral judgments without coercion from any political institution."[7]

In the context of the relationship between church and state, Methodist religious discipline affirms:

> "The American Declaration of Independence declares that life, liberty, and the pursuit of happiness are the inalienable rights of every human being. This implies that these rights are not the gifts of governments, but the gifts of God. Civil governments exist, not to confer these rights, but to guarantee them to all men alike and to protect all men in the fullest possible enjoyment of them. The right to be free implies not only the freedom of the body but the freedom of the mind. * * *
>
> "* * * Our role is not to suppress ideas, but to open channels of communication so that men can come to know the thoughts of their neighbors, and so that the best thoughts of all men can come to be possessions of all mankind."
>
> Paragraph 2024, Discipline of the Methodist Church, 1956.

We have referred to religious principles governing First Methodist Church of San Leandro and First Unitarian Church of Berkeley to emphasize that Article XX is in irreconcilable conflict with these principles in restraining the free exercise of the religions which call for commitment to them. The dictates of Article XX foreclose the exercise of

7. For full statement of the Methodist Discipline and doctrine quoted from, reference is respectfully made, in the interest of avoiding repetition, to pages 3 to 4 of the motions to which this brief is appended and the quotations there are here incorporated by reference.

unrestricted loyalty to God, of freedom to make moral judgments without coercion from political institutions and of the individual right to advocate what might be considered unorthodox in terms of national interest whenever those freedoms may, in the minds of state authorities, be considered inconsistent with the condemnation of Article XX. This points up another ineradicable vice of Article XX in violating religious rights protected under the First Amendment and the Fourteenth.

The effect of Article XX is to put the state as a censor in every church and in every pulpit.

In the light particularly of the vagueness of the strictures of Article XX and in the light of the delicate but imperatively vital line between advocacy and incitement, how is any minister of the gospel to know that the preachment of moral belief in his sermon relating to any current event may not be construed as condemned advocacy, with dollar penalties attached? And how is he to protect himself from the dissidents in his congregation who may twist the condemnation of Article XX for ulterior purposes of their own?

The court below tells us that the prohibitions of Article XX "are mandatory and prohibitory." 48 Cal. 2d 419 at 428. That is to say, they are absolute. Therefore, a minister of the gospel, regardless of whether the declaration demanded by Section 32 has or has not been provided, must, at his peril, measure every word in every sermon against the amorphous, undefined strictures of Article XX. He must constantly be torn between the religious need for free expression in his pulpit and the possibility that it will be construed as subversive by lay authority with the power, if Article XX be valid, to levy tax tribute from his church. If this analysis be true, then the wall separating church and state is indeed demolished. The state has found a powerful seat within the walls of the church.

Earnestly as we hold the views expressed above, we do not claim that the rights of religious freedom guaranteed by the First and Fourteenth Amendments are absolute. In common with other guarantees of the Bill of Rights, we recognize that the law calls for their measurement and balancing against the rights of the state to security.

In weighing the countervailing considerations, the course of this Court has been clear.

Where, as in *Reynolds v. U.S.* (1878), 98 U.S. 145, in *Davis v. Beason* (1890), 133 U.S. 333, in *Mormon Church v. U.S.* (1890), 136 U.S. 1, and in *Cleveland v. U.S.* (1946), 329 U.S. 14, religious doctrine called for action in plain violation of criminal statutes—statutes prohibiting polygamy—the interest of the state was held paramount.[8]

Prince v. Massachusetts (1944), 321 U.S. 158, is illustrative of cases in which protection of religious freedom was subordinated to state power on less compelling grounds than the state's right to prevent crime. There, the interest of the state in providing for the welfare of children was deemed sufficient by the 5-4 majority.

The picture is very different, however, when the professed interest of the state is less compelling than prevention of crime or protection of the young.

In *Watson v. Jones* (1871), 80 U.S. (13 Wall.) 679, the power of the state to determine ownership of property yielded to the right of churches to interpret religious doctrine where such interpretation was crucial to property

[8] *Davis v. Beason* does present some problems. It could be contended that it approves statutory prohibition of mere advocacy of polygamy, as distinguished from effective incitement to polygamy or the practice of polygamy itself. However, it appears that the constitutional objections to outlawing mere advocacy were not urged upon or fully considered by the Court and it appears, further, that the case in the last analysis turns upon perjury.

rights. In *Murdock v. Pennsylvania* (1942), 319 U.S. 105, the power to license the peddling of goods, wares, etc., was subordinated to the paramount right of dissemination of church tracts. In *Martin v. City of Struthers* (1943), 319 U.S. 141, state power to regulate house-to-house canvassing was required to yield to the right of exercising religion in handing out religious tracts. In *Cantwell v. Connecticut* (1940), 310 U.S. 296, state power to regulate solicitation and even to head off potential breaches of the peace, likewise was subordinated to rights of religious freedom. In *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94, protection of religious freedom prevailed over state law to the extent of recognizing that ecclesiastical law or doctrine controlled the right to use church property, notwithstanding that recognition of the paramountcy of ecclesiastical doctrine vested control of use in the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, as against the claims of the Russian church in America. In *Girouard v. U.S.* (1946), 328 U.S. 61, the power of the nation to require the bearing of arms in its defense as a condition of citizenship was subordinated to religious scruples. And in *West Virginia Board of Education v. Barnette* (1943), 319 U.S. 624, supra, the right of religious freedom prevailed over the state's effort to impose a coerced affirmation of loyalty in the form of saluting and pledging allegiance to our flag.

It would seem conservative to say that this Court has resolutely placed the guarantee of freedom of religion under the First Amendment above state power except where the need for preferring state power has been utterly clear and compelling. **It is neither clear nor compelling here. There is no evidence here that any church in California threatens the security of that state or of the United States. There isn't**

even the pretense of any such evidence. There were no legislative investigations or findings of any kind.

No church before this Court has been found to threaten or even charged with threatening the security of any temporal power, national, state or local.

Upon analysis, it is clear that the state constitutional provision is grounded in no more than an assumed, but unreal, need for protection of the state and nation. It is also clear that in effect it demolishes the wall of separation between church and state by requiring obeisance from the former to the latter, exacted on pain of penalty which most churches can ill afford, the penalty of taxation as the price of nonconformity.

This brings us to consideration of the impact of Section 32 upon the right of free exercise of religion. It need not detain us long for the reason that every constitutional vice attending Article XX is plainly inherent in Section 32. And Section 32 has supplemental vices readily disclosed by a little analysis.

Section 32's demand for a self-serving protestation of loyalty is innately irrational because it equates refusal to sign a loyalty oath with disloyalty. No disloyalty attends the refusal by the churches before this Court. No one has ever seriously suggested that such is the case. Yet the effect of the statute is to penalize them as disloyal.

And the statute leaves them with no escape from the penalty. They might well be able to satisfy any court or the county assessor of their complete loyalty, by evidence far transcending the facile signing of a self-serving declaration. Indeed, the county assessor may know—even as a congregant—of their loyalty. Yet they must sign or they are punished as disloyal.

There is another, almost incredible, vice in the statutory scheme. Its plain effect is to exact a license fee for what it condemns as disloyalty. Pay the tax and, so far as Section 32 is concerned, disloyalty is immunized.

No church need sign the demanded declaration. By filling the palm of the tax gatherer, it is at once free of any obligation to sign and, therefore, free of any inhibition stemming from the oath. In effect, the oath scheme here does no more than put a dollar sign upon loyalty.

There is a further inherent as well as shocking consequence of the actual effect of Section 32. It puts a premium on wealth. As applied to churches, a wealthy church organization can protect its faith against the inroads of the declaration requirement by paying the tax. The smaller, poorer church must yield up its faith or be destroyed.[9]

II. Both Article XX, Section 19, of the California Constitution and Section 32 of the State Revenue and Taxation Code Violate the Constitution of the United States Because They Are, in Operating Effect, Laws Respecting an Establishment of Religion.

We shall not labor our conviction that Article XX and Section 32 are laws respecting an establishment of religion. The meaning of this prohibition of the First Amendment was declared by this Court as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the

9. The loyalty oath scheme of the statute cannot be supported by analogy to cases upholding loyalty declarations as a qualification for public service. In such cases, the threat to the state thought to be eliminated by requiring the loyalty declaration is actually eliminated to the full extent that loyalty declarations can so operate. If the applicant or holder does not sign, he is completely barred from the position. Here, the refusal to sign the declaration, coupled with the resulting requisite of paying the tax, leaves the non exempted organization, so far as Section 32 is concerned, utterly free to pursue ways deemed inimical by Section 32.

> Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education* (1947), 370 U.S. 1, at 15.

To contend that Article XX and Section 32 do not aid those religions whose doctrines conform to such orthodoxy, as lies in their strictures against advocacy of overthrow and against support of a foreign government in the event of hostilities is to argue against the obvious. Indeed, it is to argue against the interpretation, in this context, put upon these measures by the majority speaking for the court below.

> "* * * There are additional interests with which the state is concerned and which it is attempting to promote by granting exemptions from taxation. Included is the interest of the state in maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces. *This legitimate objective is sought to be accomplished by placing in a favored economic position, and thus to promote their well being and sphere of influence, those particular persons and groups of individuals who are capable of formulating policies relating to good morals and respect for the law.* * * *" (48 Cal. 2d 419 at 438; emphasis added.)

There could be no more authoritative interpretation than by the Supreme Court of the State of California of the purposes of these state laws. It seems to us that the court below has accordingly virtually conceded that Article XX and Section 32 promote orthodoxy, making it plain that these measures defy the declaration of this Court that:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens

to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624 at 642.

III. Section 32 Unconstitutionally Subverts the Presumption of Innocence by Demanding of Churches an Expurgatory Declaration as the Price of Tax Exemption.

It is true that in some cases loyalty oaths or declarations have been sustained by this Court. If investigation has revealed threatened disloyalty or if public safety is endangered by the disloyalty of those engaged in public service, it has been held that loyalty oaths may validly be imposed. See, for example, *Gerende v. Board of Supervisors* (1951), 341 U.S. 56 (candidate for public office), *Garner v. Board of Public Works* (1951), 341 U.S. 716 (municipal employee), *American Communications Ass'n v. Douds* (1950), 339 U.S. 382 (union officials' control through political strikes), *Peckman v. Leonard* (1952), 39 C.2d 676 ("civil defense workers"). Cf. *Wieman v. Updegraff* (1952), 344 U.S. 183 (state employee oath invalid; scienter lacking).

Neither the cited cases nor others like them lend any support whatever to the validity of the oath or declaration demanded pursuant to Section 32. As pointed out earlier, no investigation has revealed disloyalty or the threat of it in churches. As also pointed out earlier, not a scrap of evidence has been or can be adduced to show that worship of God inspires criminal disloyalty or that places of worship harbor traitors or that church goers as a class endanger public safety.

Yet when application for the traditional tax exemption is made by any church in California, it is, in effect, accused, under Section 32, of threatening the state by traitorous conduct. To expurgate this "guilt", it must protest its

innocence, under pain of paying a tax penalty which infringes upon the free exercise of religion guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

As applied to churches, the oath scheme before the Court here is based upon an unfounded, unreasonable and unsupported legislative assumption that religious organizations are guilty of criminal conduct or intent and must purge themselves, by a coerced protestation that they are innocent of crimes that they have neither been accused of nor committed; otherwise they are to be punished summarily by taxation.

Since neither fact nor reason justifies the imposition of expurgatory oaths or declarations upon churches, the legislative scheme runs athwart a clear line of decisions in which the United States Supreme Court has declared it unconstitutional to fix guilt or presumptive guilt by mere legislative fiat. *Cummings v. Missouri* (1866), 4 Wall. (U.S.) 277; *Bailey v. Alabama* (1911), 219 U.S. 219; *McFarland v. American Sugar Co.* (1915), 241 U.S. 79; *Manley v. Georgia* (1928), 279 U.S. 1; *Tot v. United States* (1943), 319 U.S. 463.

The statutory scheme here before the Court is close to being on all fours with *Cummings*.[10] There an article of the Constitution of the State of Missouri, as amended after the Civil War, undertook to impose an oath upon clergymen as a condition of their right to preach and teach. There, as here, the price was to protest, by expurgatory oath, their

10. True, *Cummings* emphasized the bill of attainder and ex post facto consequences of the Missouri oath. However, upon analysis it would seem that the rationale of the case is more strongly bottomed upon protection, so vital to all freedoms in the Anglo-Saxon concept of law, of the presumption that human beings are innocent, not guilty, of crime.

loyalty and their non-support of enemies of the United States. A majority of the court, speaking through Mr. Justice Field, struck down the demanded oath, declaring:

> **"The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."** (4 Wall. (U.S.) 277, at p. 328; emphasis added.)

Nor is the scheme here before the Court for review saved by the difference (if it be a difference) that the right of worship is not totally destroyed by refusal to proffer the demanded expuragtory declaration, i.e., that the only consequence of refusal is exposure to taxation. If the state may not make an expurgatory oath a condition of the right to worship, it may not indirectly achieve the same result by an exercise of its taxing powers wholly unrelated to the raising of revenue. Or, to put it in other words, if the state elects to create the privilege of exemption from taxes, it may not attach unconstitutional conditions as the price of obtaining the exemption. See *Frost Trucking Co. v. R.R. Comm.* (1926), 271 U.S. 583; *Hannegan v. Esquire* (1956), 327 U.S. 146, 157; *Murdock v. Pennsylvania* (1943), 319 U.S. 105, 112, *Hague v. C.I.O.* (1939), 307 U.S. 496, 516; and *Terrall v. Burke Constr. Company* (1922), 257 U.S. 529, 532.

CONCLUSION

The decisions below should be reversed.

Respectfully submitted,

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March 14, 1958

(Appendix Follows)

Appendix

CONCERNING THE RELIGIOUS PRINCIPLES OF FIRST UNITARIAN CHURCH OF BERKELEY

By J. Raymond Cope, *Minister*

In April, 1946, I was called to the ministry of The First Unitarian Church of Berkeley. The governance of the Church is and so far as I know has always been provided for by by-laws subscribed in the following words:

> "In the love of truth and the spirit of Jesus Christ, we, whose names are hereunto appended, unite together for the Worship of God, and the service of man."

The First Unitarian Church of Berkeley and the ministry thereof must, in accordance with the religious principles of the Church, be controlled by the following:

1. Fundamental respect for the religious searchings of every individual.

2. A deep-rooted regard, at once searching and tolerant, for all cultures, always emphasizing the spiritual foundations which test their validity. The prophetic* role of the minister makes it necessary for him to bring those cultures and the temporal institutions manifesting them under constant examination in a manner always freely reflecting the growing insights and needs of man.

3. A dedicated and unqualified commitment within myself to those spiritual truths which I would hold forth for guidance in the lives of others.

*Like all other Ministers, the call upon me is to fulfill a three-fold assignment: 1. The prophetic role which has precedent going back to the earliest days in Old Testament history; namely, challenging Man and his State to proceed in the light of his highest awareness; 2. Minister to the individual religious needs of my community; and 3. Administrative.

4. An awareness that our church was formed for the Worship of God and the service of man. To meet the call of leadership in the Worship of God, I must be completely free in recognizing that there is something at the heart of the universe, that it is greater than any individual, that it transcends all doctrines and creeds and that it is not limited by any barrier of class or nation.

Man's highest loyalty is to God and worship of Him is an unending search for righteousness and truth. Unitarianism calls for transcendent loyalty to God without the limitations of historical statements of doctrinal position, of temporal power, of denominational restrictions or of requirements of conformity to accepted views no matter how pervasive or prevalent.

The First Unitarian Church of Berkeley from its founding in 1893 has maintained, and so long as it may exist must maintain, separation from the State and resist any professed right of the State to circumscribe the conscience of the church, its members and ministers. The precepts of the First Unitarian Church of Berkeley require constant affirmation of universal truth, affirmation which may call at times for challenge to the very foundations of temporal culture, mores and institutions. The prophetic functions which devolve upon me and the spiritual obligations of members of the First Unitarian Church of Berkeley would be stultified and destroyed by any transference, however innocuous in appearance or form, of undivided loyalty from God to the state.